Filed 3/25/09 Hetman v. Santa Ana Unif. School Dist. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

WAYNE T. HETMAN, Plaintiff and Appellant, v. SANTA ANA UNIFIED SCHOOL DISTRICT, Defendant; RICHARD E. QUINTILONE II, Movant and Respondent.	G040214 (Super. Ct. No. 04CC06534) O P I N I O N

Appeal from an order of the Superior Court of Orange County, William M. Monroe, Judge. Reversed.

Law Offices of Andrew D. Weiss and Andrew D. Weiss for Plaintiff and Appellant.

Quintilone & Associates and Richard E. Quintilone II for Movant and Respondent.

* * *

Appellant Wayne T. Hetman sued his former employer (present action). When Hetman settled the case, Hetman also entered into a "Memorandum of Understanding of Attorneys Fees and Costs" (MOU), with the attorney representing him in the action, respondent Richard E. Quintilone II, doing business as Quintilone & Associates, over the attorney fees owed Quintilone. Not receiving payment of the fees, Quintilone sued Hetman in a separate action (fee action). But while the fee action and a fee arbitration proceeding regarding the fees were pending, Quintilone filed an ex parte application in the present action seeking to enforce the memorandum under Code of Civil Procedure section 664.6. [1] Although Quintilone still represented Hetman in the present action, the trial court issued an order enjoining Hetman from further encumbering his principal residence pending the outcome of the fee arbitration proceeding.

Hetman contends the trial court lacked jurisdiction to issue its order. We agree. The entire case had been dismissed before the trial court entered the order, and the parties had not stipulated the trial court would retain jurisdiction to enforce the MOU. Because the trial court's jurisdiction over the parties and subject matter ended upon dismissal, we reverse the trial court's order.

I

FACTUAL AND PROCEDURAL BACKGROUND

Hetman initiated the present action by suing his former employer, Santa Ana Unified School District, for employment discrimination and other torts. Quintilone and his firm represented Hetman. The parties in the present action reached a settlement at a mediation conducted by ADR Services, Inc., on October 9, 2007. As part of that settlement, Hetman, Quintilone, and another attorney who represented Hetman in connection with a series of worker compensation claims, executed the MOU, which bore

[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

the subheading "Fee and Cost Division Agreement between Client and Counsel." Referring to the present action, the MOU provided: "$45,000.00 payable to Richard E. Quintilone II, Esq. For attorneys fees and costs. Upon payment, Mr. Quintilone will purchase for Mr. Hetman a lap top computer of Mr. Quintilone's choice."

On December 12, 2007, Quintilone sued Hetman in the fee action seeking to collect the unpaid attorney fees, *Quintilone v. Hetman* (Super. Ct., Orange County, No. 30-2007-00100404-CU-BC-CJC) (fee action). On December 23, 2007, Hetman filed a petition for fee arbitration with the Orange County Bar Association.

On January 23, 2008, while the fee action and fee arbitration proceedings were pending, Quintilone filed an ex parte application in the present action seeking to enforce the MOU against Hetman through entry of judgment under section 664.6, and to be relieved as Quintilone's counsel. Quintilone set the ex parte hearing for the following day, January 24, 2008, at 8:30 a.m. In his declaration, however, Quintilone stated he told plaintiff the ex parte hearing would be held on January 23, a day earlier than the actual ex parte date. In his declaration, Hetman denied receiving any notice of the hearing, and stated he had been out of town during that time period.

Hetman did not appear at the ex parte hearing. Quintilone had another attorney from his office, Arash Shirdel, handle the motion for him. When he appeared before the court, Shirdel stated he was appearing "on behalf of the plaintiff [i.e., Hetman]." After the court questioned Shirdel why Quintilone was not attending the hearing, Shirdel replied that he was appearing on Quintilone's behalf. At the time of the hearing, Quintilone and his firm still represented Hetman in the present action. The trial court denied Quintilone's ex parte motion to be relived as counsel for Hetman.

Although Quintilone had not requested an injunction either in his ex parte papers or orally at the hearing, the trial court nonetheless granted one, ruling: "I want you to prepare an order for my signature so that you can then go ahead and record, directing Mr. Hetman not to withdraw any more funds from that property or to further

encumber that property until the fee arbitration matter has been resolved." At the court's request, Quintilone filed a request for dismissal on January 24, 2008, which the clerk rejected. Quintilone filed a second request on February 1, 2008, which the clerk entered the same day, dismissing the present action in its entirety with prejudice. On February 4, 2008, Hetman filed an opposition to Quintilone's ex parte application, contending (1) the trial court lacked jurisdiction to consider the fee dispute, (2) any action on the fee dispute had been stayed pending the outcome of the fee arbitration proceedings, and (3) Hetman had not been given notice of the ex parte hearing.

On February 13, 2008, the trial court entered its "Order Preventing Plaintiff Hetman From Further Encumbering His Property." The order provided, in relevant part: "Plaintiff's attorney of record RICHARD QUINTILONE II moved to prevent MR. WAYNE HETMAN from further encumbering his property . . . . [¶] After considering the evidence and argument of the Parties, and for GOOD CAUSE shown where applicable, the Court ORDERS the following: [¶] MR. WAYNE HETMAN is enjoined from further encumbering his property at 42 La Perla, Foothill Ranch, CA 92610-1715. Encumbering of property includes but is not limited to transfer of title, refinance of a mortgage, or mortgage of the property until the resolution of the fee arbitration filed with the Orange County Bar Association."

Hetman now appeals the trial court's order.

II

DISCUSSION

Quintilone contends we should dismiss Hetman's appeal on the grounds of mootness, explaining the trial court's injunction lasted only until resolution of the fee arbitration proceeding. Quintilone moves to augment the record on appeal to include the fee arbitration award. Quintilone relies on California Rules of Court, rule 8.155(a)(1)(A), which allows augmentation of the record with "[a]ny document filed or lodged in the case

in superior court." But Quintilone has not demonstrated he filed or lodged with the superior court the arbitration award in the present case. Because the arbitration award was not part of the record below, it cannot be used to augment the record on appeal. Accordingly, we deny Quintilone's request, and consider Hetman's contention the trial court lacked jurisdiction to issue its order enjoining Hetman from encumbering his property.

"When a court has jurisdiction over the parties and subject matter of a suit, its jurisdiction continues until a final judgment is entered. [Citation.] When there is a voluntary dismissal of an entire action, the court's jurisdiction over the parties and the subject matter terminates." (*Wackeen v. Malis* (2002) 97 Cal.App.4th 429, 437 (*Wackeen*).) Section 664.6, however, provides: "If requested by the parties, the court may retain jurisdiction over the parties to enforce the settlement until performance in full of the terms of the settlement." Thus, "even though a settlement may call for a case to be dismissed, or the plaintiff may dismiss the suit of its own accord, the court may nevertheless retain jurisdiction to enforce the terms of the settlement, until such time as all of its terms have been performed by the parties, *if the parties have requested this specific retention of jurisdiction*." (*Wackeen*, at p. 439, original italics.)

The parties' "request for retention of jurisdiction must conform to the same three requirements which the Legislature and the courts have deemed necessary for section 664.6 enforcement of the settlement itself: the request must be made (1) during the pendency of the case, not after the case has been dismissed in its entirety, (2) by the parties themselves, and (3) either in a writing signed by the parties or orally before the court." (*Wackeen*, 97 Cal.App.4th at p. 440.) "Like the stipulated settlement itself, a request that jurisdiction be retained until the settlement has been fully performed must be made either in a writing signed by the parties themselves, or orally before the court by the parties themselves, not by their attorneys of record, their spouses, or other such agents." (*Ibid.*)

The settlement between Hetman and Quintilone regarding attorney fees was not made orally in the court, but reflected in the MOU. Without deciding whether the MOU constitutes an enforceable settlement agreement under section 664.6, we note it does not authorize or request the trial court to retain jurisdiction for its enforcement. Because the present action was dismissed in its entirety before the trial court entered its order, the trial court lacked jurisdiction. Accordingly, we reverse the trial court's order.

III

DISPOSITION

The order is reversed. Hetman is entitled to the costs of this appeal.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.